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Supreme Court of the United States

OCTOBER TERM, 1937

No. 25

Commonwealth of Pennsylvania, ex rel. ELMER SULLIVAN, *Petitioner*

v.

STANLEY ASHE, Warden, State Penitentiary, Western District of Pennsylvania, *Respondent*

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR PETITIONER.

OPINION OF THE COURT BELOW.

The opinion of the Court below (R. 22) is reported in 45 Advance Reports of Pennsylvania (The Legal Intelligencer) page 305.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, on the ground that there is drawn in question the validity of a statute of the Commonwealth of

Pennsylvania which is alleged to be repugnant to the Equal Protection provision of the Fourteenth Amendment to the Constitution of the United States.

The judgment below was rendered and filed January 11, 1937, (R. 22). Petition for a writ of certiorari was filed herein April 9, 1937, and the petition granted May 17, 1937, (R. 27).

Petitioner in the present writ seeks review of a judgment of the Supreme Court of Pennsylvania, the highest Court of the State, dismissing a petition for a writ of habeas corpus, (R. 26), which alleged that petitioner was illegally confined and restrained of his liberty in the Western Penitentiary of Pennsylvania, (R. 2). The opinion and judgment, (R. 23), of the Court below shows that the principal ground alleged was that the Pennsylvania statute above referred to was in violation of the Fourteenth Amendment, (R. 23), with respect to the Equal Protection provision in that the statute provides unequal sentences for the offense of breaking prison depending upon what petitioner claimed was the merely adventitious circumstance of the duration of the sentence he was serving when he so escaped, (R. 23). The Court below specifically passed upon the constitutional question, (R. 22-26), and no non-federal basis for the decision was assigned or exists.

STATUTE INVOLVED.

The Act of 1860, March 31, P. L. 382, Section 3, reads:

> **"Escape or Rescue of Prisoners—Escape and Breaking Prison.**—If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeaner punishable, on conviction, by imprison-

ment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable, on conviction, by simple imprisonment without labor; **if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offense, other than murder in the first degree, or where the sentence is for imprisonment for degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him.** (1860, March 31, P. L. 382, Sec. 3.)" (Emphasis ours).

STATEMENT.

The petition for a writ of habeas corpus recites that petitioner on April 26, 1929, entered a plea of guilty in the Court of Quarter Sessions of Erie County, Pennsylvania, to the charge of breaking and entering and larceny. The sentence was as follows:

> "Sentenced to Western Penitentiary of Pennsylvania (situate in the County of Allegheny) by separate or solitary confinement at labor, for an indefinite term, the minimum of which shall be Three Years and the Maximum Six Years, and thereby to be kept, fed, clothed and treated as the law directs and stand committed until the sentence be complied with." (R. 1)

Petitioner was forthwith committed to the Western Penitentiary of Pennsylvania to serve his sentence, (R. 1). On February 7, 1930, petitioner was transferred to the Prison Farm known as Rockview in Centre County, and on December 28, 1931, escaped from prison but was shortly thereafter apprehended (R. 2). On December 28, 1931, he was

indicted for "wilfully, unlawfully and maliciously" breaking out of the Western Penitentiary of Pennsylvania and upon conviction was sentenced, on December 31, 1931, as follows:

> "To pay the cost of prosecution, a fine of $1.00 and undergo imprisonment in the Western Penitentiary, State of Pennsylvania, for a period not less than three years, nor more than six years, to be computed from the expiration of your original sentence from Erie County and that you stand committed until such sentence is complied with." (R. 2)

Petitioner was forthwith committed to the Western Penitentiary in compliance with the above sentence and thereafter filed a petition for a writ of habeas corpus which presents the present case. In this petition he alleged that he was confined in the penitentiary illegally and restrained of his liberty contrary to law, (R. 2). A rule to show cause having been granted, (R. 21), a hearing and argument ensued with the result that on January 11, 1937, the rule was discharged, (R. 22), pursuant to the opinion of the Court below, (R. 22-26).

The opinion below shows that the only question (except a question referred to in the last paragraph of the opinion, (R. 26), which is not pressed here) was the alleged unconstitutionality of the Pennsylvania escape statute. The Court below in its opinion stated:

> "The present writ is based upon the alleged unconstitutionality of the statute under which the sentence was imposed. The act provides, inter alia, that a prisoner breaking penitentiary or jail is guilty of a misdemeanor and upon conviction shall be sentenced to undergo an imprisonment to commence from the expiration of, and for a period of time not exceeding, the original sentence by virtue of which he had been imprisoned. The criticism leveled at the act is that for the offence of breaking prison unequal sentences are thus provided, depending upon what, it is contended, is the merely adventitious circumstance of the dura-

> tion of (fol. 35a) a former sentence of the offender. It is claimed that this is a denial of the equal protection of the laws, and therefore a violation of section 1 of the fourteenth amendment of the Constitution of the United States. It is pointed out that in this very case the petitioner, Sullivan, made his escape from Rockview simultaneously with a fellow prisoner, Clarence McCann. The two were apprehended at the same time and sentenced on the same day, but McCann received a sentence of only one to two years because that was the extent of his original sentence." (R. 23)

The Court below dismissed the Petition, (R. 26), holding there was no violation of the Equal Protection clause of the 14th Amendment, (R. 26)

SPECIFICATION OF ERRORS TO BE RELIED ON.

The Court below erred in holding that the Pennsylvania Escape statute (The Act of 1860, March 31, P. L. 382, Sec. 3) in providing that one who escapes, upon conviction:

> "shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped",

was not violative of the Fourteenth Amendment of the Constitution of the United States with respect to the Equal Protection of the Laws.

ARGUMENT.

I.

The Statute in Making the Sentence for Escape Depend Upon the Original Sentence Makes An Unreasonable Classification.

Under *United States* v. *Scharton*, 285 U. S., 518 and *United States* v. *Noveck*, 271 U. S., 201, and cases cited, an offense is constituted by the words of the statute denouncing it.

Thus in the Scharton case this Court held that the offense of attempting to "evade or defeat" an income tax does not involve a fraud upon the United States, the element of fraud not necessarily and in so many words being brought into the offense of attempting to "evade or defeat". In the same way in the present case the offense of escape is created by the words of the statute itself, and if so it means escape from the physical prison itself.[1] The statute does not denounce escape from the *punishment* of the original sentence. Yet as the statute reads, the punishment for escape is made dependent, not upon the facts and circumstances of the escape itself, but upon the *punishment* awarded by the original sentence.

We feel that this is an unreasonable classification. Thus, if two prisoners are confined in a penitentiary, one for five years and the other for ten, and escape together under exactly the same circumstances, there being no greater aggravating circumstances as to one prisoner than as to the other, the sentence assessable under the present statute would be five years for the one and ten years for the other, whereas the criminal acts denounced by the statute itself were identical.[2] In this way the statute makes as many grades of punishment for the same acts as there are prisoners undergoing different sentences, or, conversely, in creating a multitude of classes, the statute hardly makes a classification at all. The theory of punishment, that it should be proportioned to the gravity of the offense, seems violated by a statute which punishes unequally two who commit iden-

---

[1] The statute reads: "if any prisoner imprisoned in any penitentiary • • • *shall break such penitentiary or jail* • • • upon conviction of said offense shall be sentenced, etc.".

[2] This was precisely the situation in the present case. Petitioner, imprisoned for from three to six years, escaped simultaneously with a fellow prisoner named McCann serving a sentence of from one to two years. The present petitioner was sentenced for escape for a term of from three to six years, and McCann sentenced for the same escape to a term of from one to two years. (R. 23.)

tically the same statutory offense, *i. e.*, escape from physical prison walls, making the amount of punishment dependent upon something which was not part of the escape and occurred long prior thereto, the facts and circumstances relating to which the Judge sentencing for escape is entirely ignorant of.

It is no answer to this to cite, as the Court below did, decisions sustaining habitual criminal statutes, such as *Graham* v. *West Virginia*, 224 U. S., 616, 623 and *Moore* v. *Missouri*, 159 U. S., 673. In habitual criminal statutes their sentencing provisions are, in effect, read into the sentencing provision of the statute denouncing the particular offense. The sentence for the second offense is made dependent upon the fact, easily ascertainable, of a prior conviction, and so the classification applies to all second offenders alike and is reasonable. The present statute, however, makes the sentence depend, within the leeway given the Judge trying the escape charge, upon the facts and circumstances which led up to the quantum of the first sentence—facts and circumstances of which the Judge trying the escape charge could have no knowledge, involving a variety of factors entirely unrelated to the escape charge.

We think it error to argue as the Court below did, (R. 24), that one serving a heavier sentence is potentially a greater danger to society than one serving a lighter sentence. This is not necessarily so. Sentences are not always purely reformatory or graded solely on the gravity of the crime; sometimes they are exemplary and the Court purposely increases a sentence upon an offender to act as a deterrent to others. If the crimes were far enough apart, *i. e.*, if one were a felony, the other a misdemeanor, possibly the heavier sentence might roughly classify the worse offender. But as between an over-enthusiastic husband serving five years for perjury in a divorce case and a drunken driver serving one year, (the limit) for negligent homicide, who can say that the husband-convict is a "greater potential danger to

society"? Common sense tells us that he is not. Yet if the two escape together, one can be sentenced to five years and the other to one.

The inequality of the sentencing provision of the present statute is not removed by the fact that the statute confides a certain amount of discretion to the trial Judge. This discretion is a judicial discretion and must be exercised *within*, not *without*, the facts and circumstances attending the escape. It can hardly be argued that the escape statute in permitting the trial Judge to sentence an escaping prisoner to confinement "for a period of time *not exceeding* the original sentence" intended the trial Judge to take into consideration anything other than what was judicially before him on the escape charge, and this excludes all the myraid considerations leading up to the original sentence, as to which likewise there was judicial discretion. In any event it may be noted that as to the *kind* of punishment the escape statute leaves no discretion whatever but makes it mandatory that the punishment for escape should be "of the like nature" as the punishment awarded by the original sentence. Thus, however slight or technical the offense of escape might be (a "trusty" might peaceably overstep the bounds merely by a yard), if his original sentence provides for solitary confinement at hard labor his sentence for escape must likewise carry along with it a provision for solitary confinement at hard labor. In this aspect no element of discretion whatever is present in the statute herein.

II.

The Cases in Petitioner's Favor.

There seem to be no Federal cases specifically passing on the present question, the Federal Escape Statute providing a straight fine and imprisonment for not more than five years where the original sentence was for a felony, and

a fine and imprisonment for not more than one year where the original sentence was for a misdemeanor, (18 U. S. C. A., Sec. 753 (h), 1936 Pocket Part). The leading authority in the States seems to be *In re Mallon*, 16 Idaho 737, 103 Pac., 374. It is, of course, admitted that in that case the statute made the escape sentence exactly equal to the original sentence, confiding no discretion to the Judge as to the *length* of sentence, just as the present statute confides no discretion to the Judge as to the *nature* of the sentence. This difference however does not destroy the reasoning of the decision.

In *In re Mallon, supra*, the Supreme Court of Idaho held unconstitutional, as violative of the Equal Protection provision of the Fourteenth Amendment of the Constitution of the United States, a statute providing as follows:

> "Every state prisoner confined in the state prison for a term less than for life, who escapes therefrom is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison. (Sec. 6452, Revised Codes of Idaho)."

In ruling on the question herein the Court said:

> "It will be observed that the punishment to be inflicted under this statute depends entirely upon the sentence the convict is serving at the time of the escape. If a convict is serving a one year sentence and escapes, upon conviction of such escape he must be sentenced to serve an additional year from the expiration of the first sentence.
>
> "If a convict is serving a twenty year sentence and escapes, upon conviction of such escape he must be sentenced to serve an additional twenty years from the expiration of the first sentence. A maximum and minimum penalty, within which the court is given the discretion to fix the punishment according to the gravity

of the offense, is not permitted. The offense is not divided into grades, unless it can be said that the grade of the crime is fixed by the sentence from which the convict is escaping; and the attorney general adopts this contention and argues that the statute does graduate the punishment according to the offense for which the convict was serving at the time of the escape, and that this is a proper and reasonable classification.

"We think it may be stated as a general proposition of law that every person is entitled to the equal protection of the law, and that equal protection of the law means that equal protection and security should be given to all under like circumstances in his life, his liberty and his property and in the pursuit of happiness, and in the exemption from any greater burden and charge than are equally imposed upon all others under like circumstances. (8 Cyc. 1058; *Babier* v. *Connolly,* 113 U. S., 27, 5 Sup. Ct. 357, 27 L. Ed. 924). Under this statute there would be as many different grades of crime as there are prisoners undergoing different sentences. A convict undergoing a one year sentence may conspire with a convict undergoing a twenty year sentence in planning and executing an escape, and may be the one who conceived the notion to escape, devised the plans and merely used the twenty year convict in executing such plans; yet, notwithstanding this fact, the latter, in case of conviction for escape, is required to serve an additional twenty year sentence after the expiration of the term for which he is serving, while the former is required to only serve a one year additional sentence. To say that the long term convict commits a greater offense than the short term convict is to base the punishment for such escape not upon the act of escaping from a State prison, *but upon the act of escaping from a punishment* fixed by a court in the judgment of conviction. The statute in defining the offense, however, makes the *escape from the State prison* the offense and not the escape from the *punishment of the judgment* fixed by the court upon trial. This classification is not natural, but arbitrary. To justify a classification of grades of crime, there must appear some good and valid reason why the classification should be made as made.

* * * * *

> "The very theory of punishment, to be imposed for violations of the law, is that such punishment should be proportioned to the gravity of the offense. For a statute to say that a convict confined in the State prison for a term of six months (as an illustration), who by force and violence breaks out of such State prison, upon conviction for such escape can only be confined for the term of six months, while a convict who peaceably escapes, without resorting to force or violence, shall be *subject to* a twenty year sentence because at the time of the escape he was serving such a sentence, is fixing an arbitrary, unnatural and unjust punishment, and is contrary to the spirit and in violation of the Constitution of the United States as well as the Constitution of this State. While the legislature in prescribing and fixing punishment for crime, has very great latitude in classifying the same, still the rule is well recognized, that in making such classification it should be natural and not arbitrary, and should be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime." (In re Mallon, 16 Idaho, 743, 744, 745; Italics ours).

The Court then said:

> "a classification based upon the character of sentence being served is, in our judgment, arbitrary and unreasonable, and a clear violation of the provisions of the Constitution of this State and the Fourteenth Amendment to the Constitution of the United States, which guarantees to every person equal protection before the law." (In re Mallon, 16 Idaho, 748.)

State v. *Johnsey,* 46 Okla. Cr. App., 233, 287 Pac., 729, is to the same effect with regard to a statute reading as follows:

> "Any person committed to a State prison who shall escape from or break said State prison with intent to escape therefrom, or who shall attempt by force or violence, or in any other manner, to escape from said prison, whether such escape be affected or not, shall upon conviction thereof be punished by imprisonment

in said prison for a term *not exceeding double* the term for which he was so sentenced, to commence from and after the expiration of his former sentence." (*State* v. *Johnsey,* 287 Pac., 729; Italics ours.)

The Court said:

"The very theory of punishment to be imposed for violations of the law is that such punishment should be proportioned to the gravity of the offense. While the Legislature in prescribing and fixing punishment for crime has very great latitude in classifying the same, still such classification should be natural and not arbitrary and should be made with reference to the *heinousness or gravity of the act or acts made a crime,* and not with reference to *matters disconnected with the crime.* The authorities are practically unanimous upon the question that the classification must be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime. *State* v. *Lewin,* 53 Kan., 679, 37 P. 168; *Ex parte Mallon,* 16 Idaho 737, 103 P. 374, 22 L.R.A. (N.S.) 1123; *Hurtado* v. *Calif.,* 110 U. S. 516-534, 4 S. Ct. 292, 28 L. Ed. 232; 8 Cyc. 1058, 1059; *Barbier* v. *Connolly,* 113 U. S. 27, 5 S. Ct., 357, 27 L. Ed. 924.

"An examination of this statute leads to the conclusion that the classification is arbitrary, and that the punishment is not fixed according to the heinousness or gravity of the act, but is left to be fixed by matters occurring independent of the crime.

"Section 8361, *supra,* is unconstitutional for the reason that it violates that part of the Fourteenth Amendment to the Constitution of the United States of America which prohibits the State from denying to any person within its jurisdiction the equal protection of the laws. *Bowman* v. *Lewis,* 101 U. S., 22, 25 L. Ed. 989; *In re Kemmler,* 136 U. S., 436, 10 S. Ct. 920, 34 L. Ed. 524". (*State* v. *Johnsey,* 287 Pac. 730; Italics ours.)

In *State* v. *Lewin,* 53 Kan., 679, 37 Pac. 168, the statute involved was somewhat different, but the principle was the same. The statute reads:

"Sec. 28. That in case any convict shall escape from the penitentiary, or from the custody of any officer, or to make an attempt to so escape, or shall join in any mutiny, or shall make an attempt at mutiny, or in any manner do any act to cause others to mutiny, while in confinement in the State penitentiary, or while in the custody of any officer, the said convict shall be taken by the warden before the district court of Leavenworth county, on information filed by the warden; and if the charge be sustained, *the time said convict had served in the penitentiary prior to such act as charged shall not be counted* as any part of the term of his sentence, but the said convict shall be sentenced by the court to confinement in the State penitentiary *for the full term for which he or she was sentenced by the court* before whom he or she was convicted and undergoing sentence at the time of the violating the provisions of this section; provided, that no limitation shall bar proceedings under this section." (*State* v. *Lewin,* 53 Kan. 679, 37 Pac. 168, 169; Italics ours.)

After holding that this statute was unconstitutional with respect to the State Constitution the Court said:

"The section is open to other serious constitutional objections. Its provisions do not commend themselves to our sense of justice. The punishment required to be imposed *is not to be measured by the offense committed,* but is made to depend wholly on the date of the sentence under which the prisoner was confined in the penitentiary at the time he committed the act for which he is punished. The court is required simply to obliterate the time that he has been confined in the penitentiary, for his original offense, and, as a punishment for the escape or mutiny, to reimpose the sentence given by the court for his prior crime. So it may happen under this section that two men attempting or effecting an escape from the penitentiary on the same day, in concert, under precisely the same circumstances, and with exactly equal guilt, would receive wholly different punishment. If one had been confined but for a day, his punishment would be increased but by one day while the other, who might have been confined for

20 years, would be sentenced to a further confinement for that number of years. Is not this, in effect, not merely placing a defendant twice in jeopardy for the same offense, but in fact punishing him twice? Can this be said to be an impartial administration of justice? Can it be said to be affording to all individuals the equal protection of the laws? The inherent vice of such an enactment is not fully apparent until the fact is recognized that at the penitentiary, where there are no witnesses of what transpires but convicts and officers, the oath of a convict would have little weight against that of an officer, and a charge preferred and backed up by the oath of an officer would in most cases insure a conviction, thus unduly increasing the necessarily great power of the warden over the inmates under him. We are not disposed to strain our construction of constitutional safeguards to uphold such a statute. We think section 28 wholly void, and the order of the district court, quashing the information, is sustained." (*State* v. *Lewin*, 53 Kan., 679, 681, 37 Pac. 169; Italics ours.)

The reasoning of the above cases seems conclusive.

III.

The Practical Construction of the Present Statute.

The following data is submitted not to support a claim that an alleged constitutional statute has been applied in an unconstitutional way but to show that while theoretically the Court sentencing for escape need not award the full term of the original sentence in effect it nearly always does so.

Thus, in the Record of *Commonwealth ex rel Rymeus* v. *Ashe*, Miscellaneous Docket No. 821, Court of Common Pleas, Allegheny County, Pennsylvania, the following letter appears from Judge M. Ward Fleming, who sentenced the present petitioner for escaping, explaining the policy of the Court:

"Judges Chambers,
Forty-ninth Judicial District, Pennsylvania,
M. Ward Fleming, President Judge.

Bellefonte, Pa., August 18, 1934.

To the Honorable, the Judges of the Court of Common Pleas of Allegheny County, Pennsylvania.

Gentlemen:

"Since the establishment of Rockview *the policy of this Court* has been to impose upon inmates escaping therefrom, a sentence *exactly the same* as that originally imposed in the County from which they were committed, such sentence to be computed from the expiration of such original sentence. Cards are handed to the Court before sentence imposed showing such original sentence and the name of the County from which the inmate comes."

* * * *

"With kind personal regards, I am,

Sincerely yours,

M. Ward Fleming." (Italics ours)

Examination of the records of the Western Penitentiary, in which petitioner is confined, shows that of 102 prisoners sentenced for escape only three were given less than the original sentence. It is only fair however to add that three others were given less than their original sentence, but the record discloses that as to these latter three their original sentence was beyond their life expectancy. The following list shows the sentences:

Name	Original Sentence	Sentence for Escape
Frank Campos	5½ to 10 years	5 to 10 years
John Kelley	5 to 7 years	3½ to 7 years
William Wright	4 to 5 years 5 to 6 years	5½ to 11 years
Lee Barr	3 to 6 years	3 to 6 years
George D. Roberts	2 to 4 years 1 to 2 years 1 to 2 years	4 to 8 years

Name	Original Sentence	Sentence for Escape
Albert Mahorney	4 to 8 years	4 to 8 years
Michael Brown	3 to 6 years	3 to 6 years
George D. O'Connors	3 to 6 years 3 to 6 years	6 to 12 years
Charles Bisman	5 to 10 years	1 to 2 years
Jack Eastman	5 to 10 years	5 to 10 years
Elmer Weaver	2½ to 5 years 2½ to 5 years	5 to 10 years
Harry Herr	5 to 10 years	5 to 10 years
William James Wright	2 to 4 years	2 to 4 years
George Glenn Dailey	3 to 10 years	3 to 10 years
Walter Trent	10 to 20 years	1 to 20 years
Claude Boddie	6 to 12 years	1 to 20 years
Ralph Minter	4 to 8 years	1 to 2 years
Freeland Preston	2 to 4 years 2 to 4 years 2 to 4 years	1 to 2 years
James Duffy	5 to 10 years	5 to 10 years
J. S. Morrow	2½ to 5 years 1 to 2 years 1 to 2 years	4½ to 9 years
Nick Dubish	5 to 10 years	5 to 10 years
James Arco Ross	1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years	6 to 12 years
Richard E. Norman	3 to 10 years 3 to 10 years	6 to 20 years
Steve Waters	4 to 8 years 1 to 5 years	5 to 13 years
Irving Gilinsky	4 to 8 years	4 to 8 years
George Tomachesky	5 to 10 years	5 to 10 years
William Penland	6 to 12 years	6 to 12 years
Charles Elmer Ward	4 to 8 years	4 to 8 years
Frank Clarke	1½ to 3 years	1½ to 3 years
Walter Vance	3 to 6 years	3 to 6 years
Morgan Grimm	3 to 6 years	3 to 6 years
Carl White	Indefinite, 5 year maximum	2½ to 5 years
Elmer Sullivan	3 to 6 years	3 to 6 years
Fred Williams	4 to 8 years 4 to 8 years	8 to 16 years
Jack Dunn	5 to 15 years	5 to 15 years
John Pie	6 to 12 years	6 to 12 years
Thomas Lewis	5 to 10 years 5 to 10 years	10 to 20 years

Name	Original Sentence	Sentence for Escape
R. B. Canfield	2 to 4 years 2 to 4 years 2 to 4 years	½ to 1 year
Harry Lehna	18 years, 4 months to 55 years	18 to 36 years
Rafael Paschel	4 years, 10 months to 9 years, 8 months	4 years, 10 months to 9 years, 8 months
W. H. Marlin	3 to 7 years	3 to 7 years
John Hilty	3 to 6 years	3 to 6 years
Raymond Van Fossen	4 to 8 years	4 to 8 years
Joseph Cetinski	3 to 6 years	3 to 6 years
Alex Palm	2½ to 5 years	2½ to 5 years
Richard Thomas	1 to 2 years 1 to 2 years	2 to 4 years
Martin Zajac	5 to 10 years	5 to 10 years
John Griffin	1½ to 3 years	1½ to 3 years
William Meyers	5 to 10 years	5 to 10 years
William Lindsay	3½ to 7 years 3½ to 7 years	7 to 14 years
John Desimone	4½ to 7 years	3½ to 7 years
Walter Gordon	10 to 20 years	10 to 20 years
John L. Sullivan	1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years	7 to 14 years
Joe Williams	3 to 6 years	3 to 6 years
John A. McGinnis	1 to 2 years 1 to 2 years 1 to 2 years	3 to 6 years
Charles Weaver	5 to 10 years 5 to 10 years	10 to 20 years
Theodore Geisler	2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years	3 to 6 years
Frederick Prince	5 to 10 years 5 to 10 years 5 to 10 years	3 to 6 years
Edward Fatson	4 years, 7 months to 10 years	4 years, 7 months to 10 years

Name	Original Sentence	Sentence for Escape
Walter Ross	1½ to 3 years	1½ to 3 years
James Thomas	3½ to 7 years	3½ to 7 years
Lee Melzer	5 to 10 years 2 to 4 years	7 to 14 years
Jack W. Lawson	5 to 10 years	5 to 10 years
Edward J. Forstal	3 to 6 years	3 to 6 years
Thomas O'Dowd	2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years	10 to 20 years
Walter Scott	6 to 12 years	6 to 12 years
Vincent Velock	2½ to 5 years	2½ to 5 years
Louis Bankey	8½ to 17 years	8½ to 17 years
Ray White	3½ to 7 years	3½ to 7 years
Arnold Rahloff	6 to 12 years	6 to 12 years
Albert Fulmer	5 to 10 years 1 to 2 years 1 to 2 years	7 to 14 years
Wayne Daugherty	5 to 10 years	5 to 10 years
Frank Nedean	1 to 3 years 1 to 3 years 1 to 3 years 1 to 3 years 1 to 3 years	5 to 15 years
Tony Jurista	3 to 6 years 1 to 2 years 1 to 2 years 1 to 2 years	6 to 12 years
Elmer Hendershot	4 to 8 years 1 to 2 years	5 to 10 years
John Martin	5 to 10 years 5 to 10 years 5 to 10 years 5 to 10 years	1 to 2 years
James Rieg	5 to 10 years	5 to 10 years
Frank Rausch	1½ to 3 years	1½ to 3 years
Charles B. Litzinger	10 to 20 years	10 to 20 years
William Buck	5 to 10 years	5 to 10 years
Ralph Manning	5 to 10 years	5 to 10 years
David Prosser	3 to 6 years	4 to 8 years
Cecil Rice	2 to 4 years	2 to 4 years
Ray Palmer	4 to 8 years	4 to 8 years
Jesse Neff	4 to 5 years	2½ to 5 years
Joseph W. Weicht	2 to 4 years	2 to 4 years
John Wesoloski	3 to 6 years	3 to 6 years
Charles McLean	2 to 4 years 2 to 4 years 2 to 4 years	6 to 12 years

Name	Original Sentence	Sentence for Escape
James Meachen	3 to 6 years 3 to 6 years 3 to 6 years	9 to 18 years
Leo Stiles	1 to 5 years	1 to 5 years
John P. Johnston	3 to 6 years	3 to 6 years
Paul Broadwater	1 to 2 years	1 to 2 years
William Isett	5 to 10 years	5 to 10 years
George Bruner	3 to 6 years 3 to 6 years	6 to 12 years
George Baughtman	3 to 6 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 1 to 2 years	12 to 24 years
George Penrod	3 to 6 years	3 to 6 years
Willard Malarchy	3 to 6 years	3 to 6 years
George W. Trost	2½ to 5 years 4 to 8 years 4 to 8 years	4 to 8 years
Frank Leput	2 to 4 years 3 to 6 years	5 to 10 years
Homer Hoon	3½ to 7 years	3½ to 7 years
John Short	2 to 4 years	2 to 4 years
Fred Warner	3 to 10 years	3 to 10 years

It will be seen from the above that the Pennsylvania Courts in sentencing prisoners for escape have taken the provisions of the escape statute at their face value and have either felt themselves bound by the original sentence when arriving at the quantum of the escape sentence, or, as suggested by counsel herein, have properly considered that if any discretion be confided to them under the Escape Statute such discretion must be exercised within the facts and circumstances shown as to the escape itself. This data is proof that the sentence for the original offense is not a mere guide but a shackle. As the original sentence was the result not only of the facts and circumstances of the original case, but of the possible necessity of making an example by a heavy sentence as a deterrent to a prevalent form of crime, it follows that all of these elements leading up to the original sentence are read into the escape

statute and result, through the trial Judge's ignorance of what actually led to the quantum of the original sentence, in a haphazard classification for the escape sentence.

It follows that under *Barbier* v. *Connolly*, 113 U. S., 27, equal protection and security have not been given even to escaping convicts "under like circumstances". The only circumstances known to the Court trying a convict for escape are the circumstances of the escape itself, and if the escape statute renders convicts "under like circumstances", i.e., escaping together, punishable by different sentences dependent upon outside earlier happenings of which the Court is ignorant, it would seem that the classification is clearly unreasonable and arbitrary within the meaning of the Equal Protection Clause.

IV.

Escape Laws of Other States.

The following data is submitted as an indication of the unusual character of the Pennsylvania statute, and of the tacit or unconscious disapproval of it among the overwhelming number of other States.

Analysis of State Laws Pertaining to Escape.

State	Sentence	Authority
Alabama	3 months to 1 year	Alabama Code of 1928, Sec. 4012; (1933, P. 627, Sec. 2)
Arizona	For felony, not to exceed 5 years; for misdemeanor, not to exceed 6 months	Revised Code of 1928, Struckmeyer, Sec. 4539 and Sec. 4485.
Arkansas	Escape from penitentiary, 30 days to 5 years; from custody or place of confinement, fine of $50 and imprisonment of 6 months	Digest of Statutes, Crawford & Moses, Sec. 2575 and Sec. 2579.
Georgia	Three months to 4 years	Parks Annotated Code, Vol. 6 (1914), Sec. 321 (sec. 319); Sec. 319 (sec. 314).
Illinois	1 to 10 years	Annotated Statutes, Smith-Hurd, Vol. 5, Chap. 118, sec. 18.

State	Sentence	Authority
Iowa	Not to exceed 5 years, commencing with expiration of original sentence	Code of Iowa, 1931, Sec. 13-351; (S. 13, sec. 4897-a; C 24, 27, sec. 13351).
Kentucky	Not exceeding 6 years, after original sentence	Carrals' Kentucky Statutes, 1930, p. 741, Sec. 1232.
Louisiana	Imprisonment or fine or both at discretion of court	Code of Criminal Procedure, Dart, 1932, Sec. 923.
Mississippi	Not to exceed 5 years commencing after expiration of original sentence	Code, 1930, Annotated, p. 565, Sec. 909.
Montana	1 to 10 years commencing after expiration of original sentence	Revised Codes of Montana, 1935, Sec. 10867.
Nebraska	1 to 10 years	Compiled Statutes, 1929, Sec. 28-736.
Nevada	Offense of escape a misdemeanor, no definite sentence	Compiled Laws, 1929, Hillyer, Vol. 5, p. 3063, Sec. 10023.
New Mexico	Not less than 25 years, nor more than 50 years	Annotated Statutes, 1929, Sec. 75-133.
North Carolina	Offense of escape a misdemeanor	Annotated Code, 1931, Sec. 4404; Supplement, 1933, Sec. 7748 (V).
Oregon	Offense of escape a felony, punishment not to exceed 10 years	Code Annotated, 1930, Vol. 1, p. 1313, Sec. 14-418.
South Dakota	Offense of escape a felony, punishment not to exceed 5 years	Compiled Laws, 1929, Vol. 1, p. 1113, Sec. 3732.
Tennessee	Not to exceed 5 years commencing after expiration of original sentence	Code of Tennessee, 1932, Williams, Shannon, Harsh, Sec. 12151; Sec. 12154.
Vermont	Imprisonment not more than 5 years, fine not more than $500	Public Laws, 1933, Sec. 8671.
Virginia	Punishment not exceeding one year	Annotated Code of 1930, Sec. 4507; Sec. 4508.
West Virginia	Not less than 1 nor more than 5 years	Official Code, 1931, p. 1529, Art. 8, Sec. 1; Art. 8, Sec. 2.
Wyoming	1 to 10 years	Revised Statute, 1931, Sec. 32-823.
California	Offense a felony, punishment not exceeding 10 years and a fine not exceeding $10,000	Penal Code, Deering, 1931, Chapter III, p. 55, Sec. 105; Sec. 106; Sec. 107.

State	Sentence	Authority
Connecticut	Escape from State prison, not exceeding 10 years; from county jail or work house, not exceeding 5 years; attempt with violence not exceeding 10 years	General Statutes of Connecticut, Revision of 1930, Chapter 326, Sec. 6173; Sec. 6175; Sec. 6178.
Delaware	Not exceeding 1 year	Revised Code of Delaware, 1935, Sec. 18; Sec. 4135.
Florida	Not exceeding one year	Compiled General Laws of Florida, 1927, Sec. 8588, (6250).
Idaho	Offense a felony if original offense a felony; offense a misdemeanor if original offense a misdemeanor; punishment for felony not exceeding 5 years or fine not exceeding $5,000 or by both; punishment for misdemeanor not exceeding 6 months, or fine not exceeding $800, or by both	Annotated, Vol. 1, p. 956, (1932), Sec. 17-803; Sec. 17-804; Sec. 17-112; Sec. 17-113.
Indiana	Imprisonment not exceeding the length of time for which such escaping convict was originally sentenced, to commence from expiration of original term of imprisonment	Burns, Indiana Statutes Annotated, 1933, Vol. 4, St. 2609. 10-1807; 10-1808, (2610).
Kansas	5 years	General Statutes Annotated, Corrick, 1935, Chap. 21, Art. 7; Sec. 21-733; Sec. 21-732; Sec. 21-734; Revised Statutes, 1923, Sec. 210732, Sec. 21-734.
Maine	Offense a felony, punishment one to seven years; as for any other offense not more than 11 months	Revised Statutes of Maine, 1930, Chap. 133, p. 1565, Sec. 16, R. S. c. 124, Chap. 152, Sec. 45, R. S. c. 142.
Maryland	18 months to 10 years	Annotated Code of Maryland, Bagby, Vol. 1, p. 1013, Art. 27, Sec. 138.
Massachusetts	Not exceeding 5 years	General Laws of Massachusetts, Tercentenary Ed., 1932, Vol. II, p. 3154, Chap. 268, Sec. 16, Amendment, 1934.
Michigan	Not more than 3 years	Compiled Laws of State of Michigan, 1929, Vol. 3, p. 5809, Law 16586, Sec. 24.

State	Sentence	Authority
Minnesota	Where offense a felony, punishment 1 to 7 years; for gross misdemeanor, punishment not more than 1 year or fine of not more than $1000; misdemeanor not more than 3 months, or fine of not more than $100; where force or violence is used, punishment not exceeding 5 years	Mason's Minnesota Statutes, 1924, Vol. 2, Chap. 96, p. 1980, Sec. 10007; Sec. 10008; Chap. 106, p. 2097, Sec. 10867; Chap. 93, p. 1966, Sec. 9921; Sec. 9923; Sec. 9922; Sec. 3917; Sec. 3918.
Missouri	Breaking prison, punishment not exceeding 5 years; escape punishment not exceeding 3 years; prison break from county jail not exceeding 3 years	Revised Statutes of Missouri, 1929, Vol. I, chap. 30, p. 1112, Sec. 3912; Sec. 3913; Sec. 3914; Sec. 3915; Sec. 3916.
New Hampshire	Not more than 6 months, without affecting first sentence; use of violence punishment 6 months to 10 years	Public Laws of New Hampshire, 1926, Vol. II, Chap. 400, p. 1533; Sec. 13, Sec. 14; chap. 399, p. 1524, Sec. 8.
New Jersey	Offense a misdemeanor	Cumulative Supplement to Compiled Statutes, Vol. 1, p. 835. Crimes 52-12; Compiled Statutes, 1709-1910, Vol. 3, p. 2953, Sec. 38.
New York	Offense a felony, if original offense a felony; a misdemeanor, if original offense a misdemeanor; life term prisoner attempting or escaping by force or fraud is guilty of felony; punishment for felony 1 to 7 years	McKinney's Consolidated Laws of New York, Anno. Book 39, Penal Law, p. 587; Sec. 1694; Sec. 1695; Sec. 1699.
North Dakota	For a felony punishment not exceeding $1000 fine or 1 to 5 years, or both; for a misdemeanor, punishment not exceeding 1 year or fine not exceeding $500 or both	Compiled Laws of North Dakota, 1913, Vol. II, Penal Code, Chap. 12, Sec. 9351; Sec. 9352; Sec. 9353; Sec. 9204; Sec. 9206.
Ohio	Not less than 1 year nor more than 10 years	Page's Annotated General Code, Vol. 2, p. 5571, Offenses against Public Justice, Tit. I, Chap. 8, Sec. 12840; Sec. 12831.
Oklahoma	5 years;	Act approved May 8, 1935, Senate Bill No. 276;
	If with force and violence double the original sentence	Sec. 2053, Oklahoma Code, (Harlow).

State	Sentence	Authority
Rhode Island	Not more than 3 years or fine not more than $500	General Laws of Rhode Island, Chap. 394, p. 1687, Title 39 (1923), Sec. 6002; Amended 1931; Sec. 27; Sec. 6003.
Utah	Not more than 10 years	Revised Statutes of Utah, 1933, Chap. 48, Penal Code, Sec. 103-48-2; Sec. 103-48-3; Sec. 103-1-16.
Washington	For a felony, not more than 10 years nor fine exceeding $5000 or both; for a misdemeanor, not more than 90 days or fine of more than $250	Remington's Compiled Statutes of Washington, 1922, Vol. 1, Sec. 2342; Sec. 2265; Sec. 2266.
Wisconsin	Escape from state prison, not more than 10 years; from reformatory, house of correction, not more than 30 days	Wisconsin Statutes, 1935, Sec. 346, 40; Sec. 346, 45.

It will be seen from the above that the maximum sentence under the most drastic State laws is ten years. Eleven States have a maximum of ten years; fifteen States have a maximum of five years; five States have a maximum of one year; nine States vary in punishment from three months to a maximum of seven years; three States merely make the offense a misdemeanor, and one State, New Mexico, provides a twenty-five to fifty year penalty applicable only where the escape is executed with explosives or deadly weapons. Apparently there are no escape statutes in Colorado, South Carolina or Texas. Aside from Idaho, Kansas and Oklahoma, whose statutes have already been held unconstitutional in the cases cited under Point II herein, no State has adopted the peculiar classification of the Pennsylvania statute herein involved. It is, of course, conceded that a State, within all but outrageous limits, can make the punishment for an offense what it likes. However, it seems significant to counsel, from an examination of the various State statutes, that while some of them make the sentence light and others make it heavy they all make it certain. Where the sentence is discretionary there is no indication

that the discretion to be exercised is any other form of discretion than that ordinarily exercised by a Court acting according to the facts and circumstances of the particular case. In no instance is the amount of the sentence made dependent upon any outside occurrence or prior happening.

If it seems reasonable, from the argument herein, that the purported classification herein is arbitrary, it would seem to be no answer to argue that the original sentence on which the culprit was first imprisoned was a mere conditional sentence dependent upon non-escape, and that hence the prisoner was on notice that if he escaped he might be compelled to serve double the original sentence. We think such a contention would reduce itself to the argument that an unreasonable classification and an unequal statute would be rendered reasonable and equally operative by giving notice of it beforehand to those affected. Such an argument would seem illogical, and would make any classification, however unreasonable, valid by the device of notice beforehand. Particularly would this be so in the present case wherein the notice would be that imperfect form of notice achieved by the fiction of law that the statute having been written upon the statute books, all must be presumed to have read it.

CONCLUSION.

The judgment below should be reversed.

Respectfully submitted,

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